United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-v- :

JAMES RIZZIERI, :

Appellant. :

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76-1129

BRIEF FOR APPELLANT JAMES RIZZIERI

Appeal from A Judgment of
Conviction in The United
States District Court For
The Southern District Of
New York

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BRIEF FOR APPELLANT JAMES RIZZIERI

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in permitting the Government to try together four separate phases of narcotic distributions by independent dealers based on the fact that the Ricco defendants were a common source for the drugs. For essentially the reasons stated in United States v. Bertolotti, 529 F2d 149 (2d Cir. 1975), involving many of the same transactions, alleged conspirators, and prejudicial testimony, the joint trial violated rights of defendant Rizzieri, who participated in only one distribution phase.

2. Whether the district court erred in permitting the Government to indict defendant Rizzieri in April, 1975, and to prove his participation in a conspiracy and drug sales in November, 1972, and February and March, 1973, when Rizzieri had already been indicted and convicted in the Eastern District and

sentenced to ten years on the March sale, and at the time of such indictment the Government knew about, but did not charge, the earlier sales and the alleged conspiracy pursuant to which they were made. These facts raise issues of double jeopardy as posed by Ashe v. Swenson, 397 U.S. 436 (1970), and of indictment and trial delay under Barker v. Wingo, 407 U.S. 514 (1972), and United States v. Marion, 404 U.S. 307 (1971).

STATEMENT OF THE CASE

James Rizzieri appeals from his conviction on March 5, 1976, in the United States District Court for the Southern District of New York (Lasker, J.) upon a jury verdict on one count of conspiring to sell heroin and cocaine, and two counts of selling heroin. His sentence was five years and a special parole of six, the custody to run concurrently with a ten-year sentence in the Eastern District arising out of his guilty plea to a heroin sale. Counsel on this appeal is assigned under the CJA.

The case has a strong resemblance to United States v. Bertolotti, 529 F2d 149 (2d Cir. 1975). Albert Rossi, who was at the core of the conspiracy there, was heavily involved in the transactions here. The Lucas, Flynn and Matthews rip-offs (529 F2d at 152-53) also figured in the proof below, and once again tapped conversations on Peter Mengrone's telephone (529 F2d at 158) were played to the jury. Many of the transactions, reminiscent of

Bertolotti, had no more resemblance to a single conspiracy than the "heavy-handled Rossi-Coralluzzo transactions" (529 F2d at 155). The Government sought to tie them together, however, through defendant Angelo Ricco and his uncle Anthony Ricco, insisting that they were usually the source of the narcotics distributed by Rossi and the others and that each of the distributors, although separate in time and circumstance, became co-conspirators with each other because of their dealings with the Riccos.

There were four sections to the Government's proof. The first two were Rossi's distribution, first in partnership with Freddy Blase and Peter and Anthony Criscenti, and when that ended, with Rizzieri. Rossi was the principal witness on these two phases of the case. The third section involved a partnership between defendant DiSalvo and Gary Pearson (the same Pearson mentioned in the Flynn rip-off in Bertolotti). Pearson furnished much of the proof here. Finally, there was distribution by Peter Mengrone, and he was the witness as to that.

Section I: The Rossi-Blase-Criscenti Partnership, October, 1971 - July, 1972

Rossi owed the Riccos several thousand dollars, borrowed for an abortive cocaine buy (63-69)*. To pay off the debt, he

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*Numbered references are to the transcript of trial. The Appendix filed by our co-appellants reproduces the indictment, docket entries, charge, and certain other portions of the record, and we join in it. In the separate Appendix to this Brief, we reproduce testimony and colloquy pertinent to the issues as to Rizzieri. We will give both record and Rizzieri Appendix references, where applicable, the latter designated RA.

Our statement of facts takes the proof most favorable to the Government.

arranged for the Riccos to give him ounce quantities of heroin on consignment. Rossi would pay when he sold the drugs to his own customers (72). Blase, who drove a taxi where Rossi worked (72), and Peter and Anthony Criscenti assisted Rossi in pickups, dilution and deliveries and became his partners (74-75, 96, 101), while Corrado was one of Rossi's customers (83, 84, 94). Indiviglia attended meetings with the Riccos and Rossi (102) and made one of the deliveries to Rossi (104).

Rossi claimed that he took heroin from the Riccos about twenty times while he was in partnership with Blase and the Criscentis (89, 98).

Section II: The Rossi-Rizzieri Partnership, August-December, 1972

Rossi met Rizzieri in Puerto Rico in July, 1972 (128). Rizzieri knew customers and expressed an interest in dealing with Rossi (128-29). Rossi ended his partnership with Blase and the Criscentis, brought Rizzieri in as his new partner (134, 142), and wanted now to move eighths and quarter-kilos rather than ounces (135).

The Rossi-Rizzieri partnership took quantities of heroin from the Riccos through December, 1972 (149, 157), often selling to customers of Rizzieri such as Pete Angiolillo (Pete the Weep) (148, 150). On one occasion they bought cocaine from Indiviglia, tried to sell it, and couldn't (164, 170A, 172-73). Several times they sampled Indiviglia's cocaine but didn't buy because of poor

quality. During most of this period Rossi still had not paid off his debt to the Riccos (134).

Rossi's partnership with Rizzieri ended in January, 1973 (219), with a dispute over who owed what to the Riccos after an aborted deal with Herbie Sperling, Jack Spada, and Sonny Gold.*

Rizzieri's November, February and March sales to Ferrarone; The Eastern District Indictment

In November, 1972, Peter Angiolillo sold a half kilo of heroin to DEA Agent Ferrarone. He arrived at the rendezvous in the Bronx in a car driven by Rizzieri, but left the car, by himself, to deliver the drugs to Ferrarone (826-30, RA19-22). Ferrarone dumped the money in Angiolillo's lap while he was in the car. This sale was the basis of Count Four, which charged Rizzieri with possession with intent to sell.

On February 8, 1973, Rizzieri himself sold an eighth kilo of heroin to Ferrarone (842, RA25). Angiolillo was a Government informer and set up the sale. He told Ferrarone that Rizzieri said the drugs came from Long Island (866, RA37).

Rizzieri made a third sale to Ferrarone in Queens on March 14, 1973 (847, 850, RA29, 30). This time he told the

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*Rossi and Rizzieri made one sale to DiSalvo and Ernie Coralluzzo (179), the same Coralluzzo at the core of the Bertolotti conspiracy with Rossi. Robert Browning, involved in Bertolotti, figured in the testimony here when he, Rossi and Coralluzzo went with hand grenades and pistols on the transaction with Sperling, Spada and Gold (208).

agent (848-49, RA30-31):

> "That he was having problems with his source; that one of his sources had dried out and that he had to go to some other people . . .
>
> He said he is now going to a source in Long Island . . ."
>
> See also Tr. 869-70, RA40-41 (same).

Ferrarone arrested Rizzieri in Queens immediately after the March 14 sale (851, RA33). Donovan, Rizzieri's driver arrested with him, told Ferrarone that Rizzieri was getting his drugs from Jimmy Cimino and Eddy Castellano on Long Island at this time (866-67, RA37-38), although the drugs on that particular occasion, according to what Rizzieri told Donovan, came from the Riccos (868, RA39). Rizzieri was indicted in the Eastern District on one substantive count arising out of the March 14 sale, pleaded guilty and received a ten-year sentence (665, 1819-20 RA5, 55-56).

Section III: The DiSalvo-Pearson Partnership, April, 1973

The third section of the Government's proof concerned a partnership between DiSalvo and Pearson. These two had first been in a similar partnership in 1971 (953, 1093). They came back together in April, 1973 (953). They negotiated to sell a kilo of heroin to people from Boston (960-63) (the deal aborted); sold an eighth of heroin to a Jerry Rubin on two occasions (969-70); and attempted to buy a kilo of cocaine from Rubin to sell to Peter Mengone (971-72) backed by the Riccos (1260). That transaction, the "circle jerk", also aborted when it turned out

that Mengrone's buyer was the same party supplying Pearson and DiSalvo (982). In addition, DiSalvo made several attempts at sales in New Jersey (1093).

In June, 1973, Pearson dissolved his partnership with DiSalvo (984), and attempted to sell to the Riccos his portion of the cocaine which he, Rossi and others obtained in Florida in the Flynn rip-off described in Bertolotti, 529 F2d at 153. This failed because the cocaine was bad (985-86). In October, 1973, Pearson bought a quarter kilo of heroin from DiSalvo for sale to Louis Guerra (989), cited by the Government in Bertolotti as one of the suppliers to the parties involved there, and another eighth for sale to Anthony Giacomelli (990). There was no proof that this heroin came from the Riccos.

Section IV: The Mengrone Distribution, June, 1973

Peter Mengrone was heavily in debt to loan sharks (1254). He owned the Magic Carpet, the club in the Bronx where Rossi, the Riccos and Rizzieri hung out. Although he was reluctant at first to have anything to do with narcotics (1249), he finally turned in June, 1973, to the Riccos to sell him drugs so he could bail himself out (1256). Mengrone was to make contacts and get customers (1257).

His first deal was the abortive circle jerk (Section III, supra). DiSalvo threatened to kill him if the deal fell through (1261). In July, a James Venia was to supply six kilos of heroin

for $35,000 to the Riccos through Mengrone (1269). Contrary to the Riccos' strict instructions, Mengrone gave Venia the money without receiving the heroin (1273). The Riccos planned to kidnap the children of Venia's contact, Blackie, to get the money back (1274-76).

Mengrone then engaged in abortive negotiations with another of the Bertolotti characters, Frank Lucas (1277-84); started dealing with Rossi, who had robbed Lucas of $30,000 (1285), also described in Bertolotti, 529 F2d at 153; and attempted sales of cocaine supplied by the Riccos to a Gigi (1290). An undercover agent arrested Mengrone in that last attempt (1315).*

Trial and Indictment: The indictment, filed April 23, 1975, had eleven counts, and named twelve defendants: Anthony Ricco, Angelo Ricco, Indiviglio, Rizzieri, DiSalvo, Blase, Corrado and five others -- Michael Puglisi, Anthony Zinzi, Willard Williams, Saint Julian Harrison, and Anthony Spitalieri. These last five were all purchasers from Rossi or Mengrone, and in a few instances, suppliers.

Count One grouped the named defendants, Rossi, Pearson and Mengrone, and others not named, in a narcotics conspiracy from January 1, 1971, through December 30, 1973. Of the ten remaining substantive counts, Count Four charged Rizzieri and the Riccos with distribution of a half kilo of heroin on November 22,

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*Three of the major transactions outlined by this Court in Bertolotti came into evidence at this trial as well. In addition to the Flynn and Lucas rip-offs already described, Rossi told about the Matthews-Harrison rip-off (764-65), 529 F2d at 152.

'972, and Count Five with distribution of two kilos of heroin in November or December, 1972.

Trial began January 5, 1976, against Angelo Ricco, Rizzieri, Indiviglia, DiSalvo, Blase and Corrado. It lasted three full weeks. At the end of the Government's case, the district court severed Blase on the ground that his participation was limited and he would be unfairly prejudiced by trial with the other defendants (1551-52, RA47-48). The jury returned verdicts against the remaining defendants on all the counts charged against them except for one substantive count against Corrado.

ARGUMENT

POINT I

THE GOVERNMENT PROVED SEVERAL CONSPIRACIES RATHER THAN ONE. SHOCKING AND INFLAMMATORY EVIDENCE ON THE CONSPIRACIES IN WHICH HE WAS NOT INVOLVED PREJUDICED RIZZIERI.

A. There Were at Least Three and Possibly Four Conspiracies.

In United States v. Bertolotti, 529 F2d 149 (2d Cir. 1975), this Court reversed the conviction of seven defendants charged with a single narcotics conspiracy based on their ties to Albert Rossi. The dealings in question were "loosely connected" and "diverse", and this Court was unwilling to ascribe

to the participants in one transaction knowledge of the others. Each of the defendants was prejudiced by voluminous testimony about other Rossi endeavors in which he had no part, and by "shocking and inflammatory" discussions in wiretapped conversations of Peter Mengrone. Bertolotti's reversal followed warnings in United States v. Sperling, 506 F2d 1323 (2d Cir. 1974) and United States v. Miley, 513 F2d 1191 (2d Cir. 1975), among others, that the single conspiracy theory could not sustain multiple defendant trials when the acts, although linked at the top, could reasonably be regarded as two or more conspiracies.

In this case, the Government failed to prove a single conspiracy.

Granted that the Riccos, around whom the Government based its claim, were involved in Sections I, II, and IV as the principal drug source and appeared tangentially in Section III. Granted further that each of the distributors was a co-conspirator with the Riccos. That was not enough to make the distributors co-conspirators with each other when each of the distributions was independently arranged, by independent people, at independent times, and for independent reasons.

The independence of the different sections is clear enough. The distributors traded for their own accounts, made major deals apart from the Ricco transactions, and turned freely

to other sources and other parties when the occasion suited. None considered himself part of a Ricco "organization". Rossi, for example, testified in terms of his own partnerships, first with Blase and Criscenti, and then with Rizzieri (134). He remarked about making big money, not for the Riccos but for himself (889-90). He had extensive drug dealings, before he met the Riccos (69, 72), and after with his own organization, catalogued by the Court in Bertolotti. The Riccos were nothing more than a source for as long as he needed to pay off his debt to them. The consignment feature was merely credit.

Rizzieri was in the same situation. He entered into partnership with Rossi, not with the Riccos (128). He already had his own customers (129-30). He bought cocaine from Indiviglia (173) at the same time as he bought from the Riccos (173). When he could not get drugs from the Riccos, he purchased from Cimino and Castellano in Long Island (848, RA30). Pearson and DiSalvo were also major dealers in their own right. They had very little to do with the Riccos. While Mengrone was trading with the Riccos, he worked independently with Rossi (1284) and even stole $2,000 from the Riccos (1272).* The Riccos also viewed the distributors as independent. When Rossi and Rizzieri, for example, would not consummate a heroin sale because the heroin wasn't pure, the Riccos still insisted, over Rossi's objection,

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*Mengrone was heavily involved in the Rossi transactions which the Government proved in Bertolotti, 529 F2d at 158. By the same token, all of his deals with the Riccos turned out to be non-deals. Tr. 1424-25.

"Q. As a matter of fact, the first three or four deals that you were involved in, you say that the Riccos

(cont'd)

that he and Rizzieri pay $56,000 -- the price of the heroin (212).

There are other tests. United States v. Sperling, supra, would inquire whether the ties within the different distributions were stronger than the ties from one to the other. They were, particularly the separate partnerships in each of the distributing segments. Another test from Sperling was whether there were separate witnesses on the different phases. We satisfy that too. Each of the major witnesses -- Rossi, Pearson and Mengrone -- could testify only about his section of the case.

In short, the proof showed three, and probably four, separate and independent distributions, depending on whether the Rossi-Blase conspiracy is viewed together with that of Rossi-Rizzieri -- a mass of very loosely connected transactions no different basically from those in Bertolotti.** The

*(cont'd)
were involved, were all what we call non-transactions; eventually nothing happened?

* * *

A. (by Mengrone) The circle jerk transaction doesn't come off, the James Venia transaction doesn't come off. The Gigi transaction, the same thing. And I get arrested on the fourth one . . .".

Compare, in this connection, United States v. Bertolotti, 529 F2d at 155:

"The Matthews-Harrison and Lucas matters, indeed, could hardly be classified as narcotics transactions, for no drugs changed hands."

**The fact that the district court severed Blase, but not Rizzieri, strongly suggests that Sections I and II were separate conspiracies also.

distributors each dealt with the Riccos, but they were not otherwise linked with each other. Unless they were part of a "real organization" (see United States v. Bertolotti, 529 F2d at 149), headed by the Riccos, or "vertically integrated" -- and the conclusion is inescapable that they were not -- these separate actors cannot be tied into a single conspiracy, or be found to have reached an agreement with each other relating to the sale of narcotics. United States v. Bertolotti, supra; United States v. Miley, supra (Goldstein, Bachia and Godinsky not part of single conspiracy with Lang, Wenzler, Flores and Vavarigos although both groups dealt with Brandt and Miley); Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Borelli, 336 F2d 376, 383-84 (2d Cir. 1964); United States v. Bynum, 485 F2d 490 (2d Cir. 1973) ("familiar pattern" of narcotics operations permitting imputed knowledge of wider scope is "vertically integrated" combination); United States v. Mallah, 503 F2d 971 (2d Cir. 1974) (same).*

The district court recognized this point when, after hearing the Government's theory that the Riccos' presence at the top made the different distributions, all different in time, one conspiracy, it stated (760-61, RA43-44):

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*The indictment in this case followed this Court's warnings in Sperling and Miley, and the trial followed the Bertolotti reversal. The Government could not have had clearer notice that trying all these defendants together jeopardized the conviction.

"THE COURT: It sounds like it could be spoke to me.

* * *

"THE COURT: Suppose I was the central man and did business with each one of you and you weren't connected with each other? We will have to hear it and decide when we have the facts.

* * *

"THE COURT: I must say . . . I don't see that it makes it a continuous conspiracy in the sense that it is a non-spoke conspiracy. What is the name, Kotteakos, you could call that continuous too. It isn't a question of whether chronologically one man continues to do something all the way through (here, the Riccos) . . ."

B. Voluminous, Shocking and Inflammatory Testimony on the Conspiracies With Which He Was Not Connected Prejudiced Rizzieri.

United States v. Bertolotti, supra, holds that even when there are only two conspiracies, there are grounds for reversal as to a defendant involved in only one when there is "shocking and inflammatory" proof in the other. Such proof was rampant in the Mengrone section of the case. In the "circle jerk", DiSalvo threatened to kill Mengrone. In the James Venia-Blackie transaction the Riccos were prepared to kidnap Blackie's children to secure return of the money taken from Mengrone. Mengrone was involved in Rossi's rip-off of Frank Lucas (1286), and the Riccos were prepared to go after Rossi for that (1287). And as in Bertolotti, there were the Mengrone tapes, viz., Mengrone's conversation with Rossi, G.Ex. 17-G (1316), containing the same obscenities, racial slurs, and discussions about assault, kidnapping, guns and narcotics which led this Court to reverse there.

Rizzieri had nothing to do with the Mengrone section. He was in prison when it took place (1819-20, RA55-56). He was inevitably prejudiced from the spillover from that part of the case into his separate phase.

There was also prejudice from the sheer quantity of the unrelated testimony when added to that in the Mengrone section.* Rizzieri had no involvement in the Rossi-Blase-Criscenti partnership (Section I). He had no involvement in the Pearson-DiSalvo partnership, another separate conspiracy in which the jury heard testimony of many sales or attempted sales which did not even involve the Riccos, of DiSalvo's threat to kill an agent (1090) and of the need to carry guns in that business (1091). Here, then, as in Bertolotti, 529 F2d at 157, "under the guise of its single conspiracy theory, the Government subjected . . . (appellant) to voluminous testimony related to unconnected crimes in which he took no part".

The district court's treatment of Blase removes any question on the prejudice point. The court did not sever Blase until the Government's case was complete. Tied to "this group of defendants" (1551, RA47), Blase, who was involved in only the first section, could not receive independent jury consideration of his participation in the alleged conspiracy.

Rizzieri's position was no different from Blase's. He did not appear in the first section at all, and was arrested

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*Although this case did not tie together as many defendants as Bertolotti, the numbers are substantial nonetheless. The indictment joined twelve defendants in eleven counts. Six went to trial and five to the jury. The trial lasted three weeks.

before sections III and IV took place. If there was prejudice to Blase which compelled a severance as to him (the court below was right in finding such prejudice), clearly there was similar prejudice to Rizzieri.

POINT II

RIZZIERI'S CONVICTION IN THE EASTERN DISTRICT PRECLUDED THE PRESENT CHARGES. SUCH CHARGES EXPOSED RIZZIERI TO DOUBLE JEOPARDY. THE DELAY IN OBTAINING THE SOUTHERN DISTRICT INDICTMENT VIOLATED HIS FIFTH AND SIXTH AMENDMENT RIGHTS.

In Petite v. United States, 361 U.S. 529 (1960) the Government, faced with a double jeopardy claim, moved to vacate a conviction it secured below on the grounds:

> "that it is the general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations of fairness to defendants and of efficient and orderly law enforcement.'" 361 U.S. at 530.

The Government's treatment of Rizzieri departed from that policy. The issue is whether this Court is prepared to sanction the departure.

The argument has three branches: violation of Rizzieri's speedy trial rights, double jeopardy, and the district court's error in admitting testimony about the March sale.

A. The Government's Delay Violated the Fifth and Sixth Amendments

The Government's delay of over two years in indicting

Rizzieri on the November, 1972, and February, 1973, sales and the conspiracy of which they allegedly were a part, brings into play United States v. Marion, 404 U.S. 307 (1971), and its holding that Sixth Amendment rights are triggered with arrest, and that Fifth Amendment rights are violated where pre-indictment delay gives the Government tactical advantage, or prejudices and harasses defendants. Three of the circuits have held that a state arrest can trigger speedy trial rights when that arrest is known to the federal authorities and covers crimes arising out of the same transaction as later federal charges. United States v. Cabral, 475 F2d 715 (1st Cir. 1973); United States v. DeTienne, 468 F2d 151 (7th Cir. 1972); Gravitt v. United States, 523 F2d 1211 (5th Cir. 1975). On a parity of reasoning, Rizzieri's right to a speedy trial as to all three sales should be measured from March 14, 1973, when he was first arrested.

The facts are strong. At the time of the Eastern District indictment on the March 14 sale, the Government had everything it needed to charge the November and February sales as well. The same agent, Ferrarone had made all of the buys. Rizzieri's arrest, moreover, was not just linked to the March sale. There were predetermined arrangements to effect the arrest on that date (851, RA33), and those arrangements were based on the continuing relationship Ferrarone had developed with Rizzieri

arising out of the earlier sales *848, RA30 .* Finally, the arrest was not for purposes of the indictment. Since the sale and arrest were simultaneous, the arrest came first, and the indictment afterward.

The Government not only knew about the earlier sales, it knew about the Ricco connection. Donovan, who was arrested with Rizzieri on March 14, 1973, told the agent that the Riccos were the source of Rizzieri's heroin for that deal. Rizzieri's biggest customer, Pete the Weep, the Government informant who set up the sales (865-66, RA36-37), also knew of the Ricco connection. If, as the Government has insisted, the November, February and March sales were all part of the Ricco conspiracy, the Government certainly knew that when it obtained the Eastern District indictment.

Without a hearing, we cannot know why the Government charged only the March sale and deliberately omitted everything else. We can assume there were reasons deemed to give it an advantage in prosecuting Rizzieri. Tactical advantage, and an invalid reason for the delay under the Sixth Amendment tests of Barker v. Wingo, 407 U.S. 514 (1972) appear on the face of the record. There is enough certainly to justify reversal and remand for a hearing.

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*Ferrarone testified that after the arrest the agents located Rizzieri's car in Whitestone, Queens, and seized it "because it was used in the other deliveries", to wit, November 22 and February 8 (852, RA34).

Beyond question the Government's action prejudiced and harassed Rizzieri. He had to confront first a prosecution in the Eastern District for which he received ten years. Rizzieri and the Eastern District court both believed that that sentence covered all his sales. Rizzieri was then forced to trial two and a half years later, with an added conviction, and added penalties. Although the jail portion of the sentence is concurrent, Rizzieri received an additional special parole period. And until the actual sentencing there was certainly the threat of additional custody as well.

B. The New Charges Placed Rizzieri in Double Jeopardy

The traditional formulation to evaluate double jeopardy looks to whether the same evidence supports the different charges. For these purposes conspiracy and substantive offenses are usually treated as separate crimes. United States v. Cioffi, 487 F2d 492, 498 (2d Cir. 1973). See also United States v. Nathan, 476 F2d 456 (2d Cir. 1973); United States v. Kramer, 289 F2d 909 (2d Cir. 1961); United States v. Sabella, 272 F2d 206 (2d Cir. 1959). There is recognition, however, that the traditional formulation should be re-examined in favor of a "fairness" standard. See, e.g., concurring or separate opinions of Justice Brennan in Ashe v. Swenson, 397 U.S. 436 (1970), Abbate v. United States, 359 U.S. 187 (1959), and cases collected in United States v. Cioffi, 487 F2d at 497, n.5; United States v. Mallah, 503 F2d 971, 985 n.7 (2d Cir. 1974); 75 Yale L. J. (1965).

This case, we submit, is appropriate for this Court to insist that the Government abide by its own policy of fundamental fairness after it knew of, but did not charge, the earlier sales and conspiracy in the Eastern District indictment.

C. The March Sale Was From a Different Source

We have assumed for the sake of arguing this point that the March sale was supplied by the Riccos. The preponderance of the evidence, however, was that the source for the March sale was not the Riccos. The testimony as to that sale should not have been admitted.

Rizzieri specifically stated to Agent Ferrarone that the source was in Long Island (869-70, RA40-41). He had no motive to deceive the agent on that point. The contrary information from Donovan was second-hand. The location of the sale -- the Grand Central Parkway in Queens -- confirmed Rizzieri. He would not have had the agent meet him in Queens on a delivery from the Riccos when he lived in the Bronx, the Riccos lived in the Bronx, and the agent had met him there twice previously for the earlier sales.

Evidence on the March sale prejudiced Rizzieri. The direct evidence of Rizzieri's involvement in narcotics, apart from the sales to Ferrarone, came from Rossi. This Court remarked in Bertolotti that Rossi's only display of humanity was to return $375,000 stolen from Matthews and Harrison, after

they kidnapped Rossi's associate to recover the money. 529 F2d at 153. Rossi was also shown at this trial to be mentally ill, a participant in innumerable horrendous crimes, and unworthy of belief.*

Rizzieri had not passed either cash or drugs in the November sale, so the extent of his direct participation in it was questionable.** The February sale was damaging but not overwhelming. The March sale was the most injurious. Rizzieri could say nothing about that sale because he had pleaded guilty to it. The cumulative effect of the testimony served to remove doubts the jurors may have had about Rossi's testimony, and led to his conviction on each of the three counts in which he was charged.

CONCLUSION

In view of the fact that the Government did not prove a single conspiracy, and that the variance and misjoinder prejudiced Rizzieri, the indictment should be dismissed as to him.*** Based on our arguments in Point II, dismissal should be with prejudice and should preclude any further proceedings against Rizzieri for transactions prior to his arrest on March 14, 1973.

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*We note that the Bertolotti jury rejected part of Rossi's testimony. 529 F2d at 152 n.4.

**The district court should have set aside Rizzieri's Count Four conviction. His presence in the car with Angiolillo was insufficient to sustain it.

***We join in and rely on the points of co-appellants insofar as they apply to Rizzieri.

Respectfully Submitted,

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